

STATE OF MICHIGAN
COURT OF APPEALS

RAYMOND WARRING and MARK H.
WARRING,

Plaintiffs-Appellants,

v

TOTAL MANUFACTURING SYSTEMS, INC.,

Defendant-Appellee.

UNPUBLISHED

August 7, 2007

No. 261497

Hillsdale Circuit Court

LC No. 04-000149-CZ

Before: O’Connell, P.J., and White and Markey, JJ.

PER CURIAM.

In this contract action, plaintiff Raymond Warring appeals as of right the jury trial judgment of no cause of action on his claims against defendant. Plaintiff Mark Warring appeals as of right the judgment entered against defendant, and in his favor, in the amount of \$30,340. We vacate the judgments and remand for further proceedings consistent with this opinion.

Defendant Total Manufacturing Systems, Inc. (“TMS”), is engaged in the business of selling machine tool products. Paul Foster is the president of TMS. In July 2001, Foster hired plaintiff Mark Warring as a sales manager. Foster and Mark executed a written employment agreement. The agreement provided that when Mark sold a new machine, defendant would pay him a sales commission of 30 percent of the profit. When an on-staff salesman sold a new machine, defendant would pay Mark a commission of five percent of the profit. The agreement further provided that Mark would receive biweekly “draws,” or advances against the sales commissions that he earned. Defendant provided Mark health insurance, a monthly car allowance, reimbursement of monthly expenses, a cellular telephone, and a pager.

Mark’s brother, plaintiff Raymond Warring, began working for defendant as an on-staff salesman in July 2001. Foster told Raymond that he would receive biweekly draws of \$1,500, a car allowance, and health benefits. Foster also indicated that Raymond would receive a sales commission of 30 percent of the profit on every machine that he sold. Raymond, however, never had a written employment agreement. In January 2003, Raymond presented a quote for a new machine to Systrand Manufacturing Company. Systrand purchased the machine and defendant paid Raymond and Mark a sales commission on the sale. On October 16, 2003, Foster and Raymond presented a quote to Systrand for a second machine. On October 22, 2003, Raymond resigned from TMS. Systrand eventually purchased the second machine on January 30, 2004. Defendant did not pay Raymond or Mark a sales commission for the second sale.

Plaintiffs initiated this action against defendant, asserting that they had contracts with defendant for the payment of sales commissions and that defendant breached the contracts by failing to pay sales commissions when due. At trial, the jury found that a contract between defendant and Mark existed for the payment of sales commissions and that defendant breached the contract by failing to timely pay Mark \$30,340 in commissions that he earned. The jury additionally found that there was no contract between defendant and Raymond for the payment of sales commissions and, therefore, defendant did not breach any contract when it failed to pay Raymond the commissions he allegedly earned. The trial court subsequently entered a judgment against defendant and in favor of Mark, in the amount of \$30,340. The trial court entered a judgment of no cause of action in favor of defendant on Raymond's claims.

Plaintiffs later moved for judgments notwithstanding the verdict ("JNOV"), arguing that the jury verdict was contrary to the great weight of the evidence and contrary to law. The trial court denied plaintiffs' motion.

Plaintiffs first contend that the jury's finding, that no contract existed between defendant and Raymond for the payment of sales commissions, was against the great weight of the evidence. We agree.

To preserve a claim that a jury verdict is against the great weight of the evidence, a party must raise the issue in a motion for new trial before the trial court. *Brown v Swartz Creek Memorial Post 3720 – VFW, Inc.*, 214 Mich App 15, 27; 542 NW2d 588 (1995). Plaintiffs moved for JNOVs on the ground that the jury verdict was contrary to the great weight of the evidence. "When a litigant shows that a verdict is against the great weight of the evidence, the litigant establishes a proper basis for the trial court to grant a new trial rather than judgment notwithstanding the verdict." *Kenkel v Stanley Works*, 256 Mich App 548, 561 n 10; 665 NW2d 490 (2003). Because plaintiffs raised the issue whether the verdict was against the great weight of the evidence, establishing a proper basis for the trial court to grant a new trial, plaintiffs preserved this issue for appeal. See MCR 2.611(A)(1)(e); *Hyde v Univ of Michigan Bd of Regents*, 226 Mich App 511, 525; 575 NW2d 36 (1997). We review a trial court's decision on a motion for a new trial for an abuse of discretion. *Bean v Directions Unlimited, Inc.*, 462 Mich 24, 34-35; 609 NW2d 567 (2000).

The essential elements of a valid contract are: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005). The evidence in this case overwhelmingly supported the conclusion that an oral contract existed between defendant and Raymond for the payment of sales commissions. Foster admitted at trial that he discussed the terms of such a contract with Raymond. Specifically, he told Raymond that he would pay him a 30 percent sales commission on his sales. Moreover, the evidence established that Raymond performed services for defendant with the expectation that he would receive compensation and that defendant expected to compensate Raymond for his services. Defendant paid Raymond biweekly draws of \$1,500, and Raymond sold machines for defendant. Foster also admitted that he paid sales commissions to Raymond on several occasions and that, but for Raymond's resignation, he would have paid Raymond a sales commission on the second Systrand sale.

In exchange for its oral promise to pay Raymond a sales commission on the sales he made, defendant received the benefit of the sales. Therefore, a contractual relationship was formed between the two parties. See *Hess, supra* at 592. The jury's finding that no contract existed between defendant and Raymond for the payment of sales commissions was against the great weight of the evidence as established on the record at trial. No interpretation of the evidence provides a logical explanation for the jury's finding. Oral agreements for the payment of sales commissions are enforceable. See *Reed v Kurdziel*, 352 Mich 287, 295; 89 NW2d 479 (1958); *H J Tucker & Assoc v Allied Chucker & Engineering Co*, 234 Mich App 550, 554; 595 NW2d 176 (1999). Raymond is entitled to a new trial on his claims against defendant.

Plaintiffs next contend that regardless of whether a contract existed between the parties, Raymond was entitled to receive a sales commission for the second Systrand sale under the procuring cause doctrine. Thus, the trial court erred when it instructed the jury that if it found that no contract existed between defendant and Raymond for the payment of sales commissions, it need not determine whether Raymond was the procuring cause of the second Systrand sale. We disagree with plaintiffs' argument. We review claims of instructional error de novo. *Ward v Consolidated Rail Corp*, 472 Mich 77, 83; 693 NW2d 366 (2005).

The jury found that defendant and Raymond did not have a contract for the payment of sales commissions. Thus, as instructed, the jury did not answer any remaining questions on the special verdict form regarding Raymond, including whether Raymond's actions were a procuring cause of the second Systrand sale. We conclude that the trial court's instruction regarding the verdict form was proper. The procuring cause doctrine applies in cases where the parties have an existing contract governing the payment of sales commissions but the contract is silent regarding the payment of post-termination commissions. See *Reed, supra* at 294. The trial court's instruction encompassed that rule of law. Because the jury found no contract, it was unnecessary to address the procuring cause issue. Nevertheless, because the jury's finding regarding the existence of the contract was against the great weight of the evidence, Raymond is entitled to a new trial on his claims against defendant, including his claims under the procuring cause doctrine.

Lastly, plaintiffs contend that Mark is entitled to double damages under the sales representative commissions act ("SRCA"), MCL 600.2961. We agree.

The SRCA governs the payment of commissions by a principal to a sales representative, and provides in pertinent part:

(4) All commissions that are due at the time of termination of a contract between a sales representative and principal shall be paid within 45 days after the date of termination. Commissions that become due after the termination date shall be paid within 45 days after the date on which the commission became due.

(5) A principal who fails to comply with this section is liable to the sales representative for both of the following:

(a) Actual damages caused by the failure to pay the commissions when due.

(b) If the principal is found to have intentionally failed to pay the commission when due, an amount equal to 2 times the amount of commissions due but not paid as required by this section or \$100,000.00, whichever is less. [MCL 600.2961.]

The SRCA assesses “heavy penalties against violating principals to ensure that sales representatives in Michigan are paid the full commissions to which they are entitled, especially when those commissions fall due after the termination of the employment relationship.” *Linsell, supra* at 14.

The jury in this case found that defendant owed Mark \$30,340 in unpaid commissions and that it violated the SRCA when it failed to pay those commissions. However, it also concluded that defendant’s failure to timely pay the commissions was not intentional. We hold that this finding was contrary to law and fact. In order to receive double damages under the SRCA, the sales representative need not prove that the principal acted in bad faith in failing to pay the commission. *In re Certified Question from the US Ct of App for the Sixth Circuit*, 468 Mich 109, 114; 659 NW2d 597 (2003).

[U]nder the clear language of the statute, if a principal deliberately fails to pay a commission when due, it is liable for a double-damages penalty under the statute, even if the principal did not believe, reasonably or otherwise, that the commission was owed. There is no textual indication that a principal’s good faith belief is relevant in making the determination that double damages are payable under the statute. [*Id.*]

The sales representative needed only prove that the principal purposefully failed to pay a commission when the commission became due. *Id.* at 119. “Under the language of the statute, it appears that the only cognizable defense to a double-damages claim is if the failure to pay the commission were based on inadvertence or oversight.” *Id.* at 118.

Nothing in the record supports that defendant’s failure to pay Mark the sales commission was based on inadvertence or oversight. Defendant undercompensated Mark for some sales, which undercompensation was attributable to defendant’s use of a different profit margin, or higher labor costs, in calculating the sales commission that was due. Defendant also failed to pay Mark commission on a machine that Foster sold. Foster testified that Mark was not entitled to the commission because the machine was not sold by an on-staff salesman. However, during the time Mark was employed with defendant, defendant paid Mark sales commissions on three other machines that Foster sold. Thus, the record supported that defendant arbitrarily decided not to pay Mark his owed commissions for certain sales. Defendant’s conduct was purposeful.

While a reasonable jury could have concluded that defendant did not maliciously fail to pay Mark the commissions that he earned, this conclusion did not absolve defendant from paying the penalty damages. Even if defendant reasonably believed that it paid Mark all of the commissions owing him and did not owe more, defendant’s good faith does not preclude recovery under the double damages provision of the SRCA. *In re Certified Question, supra* at 114. Defendant “is liable for a double-damages penalty under the statute, *even if [it] did not believe, reasonably or otherwise, that the commission was owed.*” *Id.* (emphasis added). Mark was found to be entitled to \$30,340 in unpaid actual commissions under MCL 600.2961(5)(a).

Because defendant's failure to timely pay Mark the commissions he earned was not based on inadvertence or oversight, Mark was also entitled, as a matter of law, to an amount equal to two times the amount of the unpaid commissions. MCL 600.2961(5)(b); *In re Certified Question*, *supra* at 118.

We vacate the judgment of no cause of action and remand this matter for a new trial on Raymond Warring's claims against defendant. Further, we vacate the judgment in favor of Mark Warring and remand for entry of a judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jane E. Markey